IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4422 OF 2006

Rajendra Dhondu Bhosale ..Petitioner
(Org.Accd.No.2 in MECR No.13/2006)

Vs.

1. The State of Maharashtra
2. Rajesh Jaswantlal Solanki ..Respondents

Mr. Nitin Pradhan with Ms. Shubhada Khot for petitioner.

Mr. Manoj Mhambre with Ms.Shilpa Gajare, APP for State.

Mr. Rizwan Merchant and Mr. S.A. Khan with Mr.Swapnil Wagh for Respondent No.2.

CORAM: B.H. MARLAPALLE,J.

Reserved on : July 20, 2007.

Pronounced on : July 25, 2007.

P.C.:

1. Heard Mr. Pradhan with Ms. Khot the learned counsel for the petitioner and Mr. Merchant the learned counsel for the respondent no.2. The learned APP appears for respondent no.1-State.

2. This is an application filed under Section 482 of Cr.P.C. invoking inherent powers of this court to, (a) quash the proceedings in Criminal Case No. 83/Misc./2006 (27/I & R/2006), (b) in the alternative direct the Police Officer of M.R.A. Marg Police Station, Mumbai to release the petitioner on bail in case of his arrest i.e. grant him an anticipatory bail and (c) by way of interim relief it has been prayed that the respondent-State of Maharashtra be directed not to take coercive action against the petitioner during the pendency of this application and to stay the proceedings in Criminal Case No.83/Misc./2006(27/I & R/2006).

3. The petition joined the Bombay Police Force on or about 10th March, 1985 as a Police Constable and came to be promoted as Police Sub Inspector from 15th September, 1994. He was transferred in March, 2003 to Dongri Police Station as the Detection Officer . C.R. No. 4 of 2004 was registered at the Dongri Police Station on 20/10/2004 at the instance of the petitioner against the present respondent no.2 for the offences punishable under Section 8(c) read with Section 21 of the NDPS Act and under Section 3 read

with Section 25 of the Arms Act and the said respondent no.2 was arrested. On 25/10/2004 the petitioner had recorded the statement of one Ravindranath Shelatkar on the basis of suspicion, however, at this stage Mr. Naval Bajaj, the Deputy Commissioner of Police, Zone-I handed over the investigation to the M.R.A. Marg Police Station as per his order dated 13/11/2004. On 17/3/2005 Senior P.I. Ambre preferred an application before the Special Judge that there was no sufficient evidence against the present respondent no.2 and, therefore, he be discharged and consequently the respondent no.2 was discharged under Section 169 of Cr.P.C. from NDPS C.R. No.4 of 2004 and was released from judicial custody after 150 days. This order of discharge passed on 17/3/2005 is a subject matter of challenge in Criminal Writ Petition No. 2923 of 2005 filed by the present petitioner. The present respondent no.2 has filed affidavit in reply in the said petition and has prayed for directions to cause investigation by the CBI so as to arrive at the truth in the role played by the present petitioner. On 27/9/2005 Sr.P.I. Ambre filed his enquiry report and prayed for "B" Summary.

4. While in the judicial custody the respondent no.2 filed private complaint on 28/2/2005 against the present petitioner and others. The said complaint had alleged commission of the offences punishable under Section 8(c) read with Section 29 and 58 of NDPS Act, 1985 and Sections 191 to 193, 195, 196, 199, 200 and 211 of IPC and Sections 3 and 25 of the Arms Act against 12 persons and accused nos.1 to 10 listed in the said complaint are the Police Officers, whereas the persons named as Accused Nos.11 to 12 are the businessmen who have filed Criminal Application No. 4478 of 2006. On the said application/complaint the Special Court (under NDPS Act) passed an order on 5/5/2005 and the operative portion of the said order reads as under:-

> "(1) The complaint so far as it relates to offences punishable under Section 58 of NDPS Act, Sections 3 and 25 of the Arms Act and other provisions of Indian Penal Code not falling under clause (i)(b)(a) of Section 195 is returned for presentation to the proper Court.

(2) The copy of the complaint be kept in remand proceeding No.162/04 for taking appropriate action under Section 340 of the Cr.P.C.

(3) It is clarified that the issue of entertaining the complaint by the Metropolitan Magistrate in respect of the offences punishable under Sections 21 and 29 read with Section 8 (c) of NDPS Act and either to direct investigation under Section 156(3) of Cr.P.C. or to take steps under chapter XV of Cr.P.C. being a jurisdictional issue, is left open for the Metropolitan Magistrate to decide."

. While passing the above order the learned Special Judge (under NDPS Act) states as under:-

".....So far as offences falling in clause (i)(b)(1) of Section 195 of Cr.P.C. are concerned, their cognizance can only be taken on the complaint in writing of the concerned court. For that, procedure under Section 340

is laid down. Necessary steps in this regard have been already taken in the remand proceeding. The investigating officer of M.R.A. Marg Police Station has been directed to file detail report. The preliminary enquiry as provided under Section 340 will have to be held in this regard.

. The offence punishable under Section 58 of NDPS Act is triable by the court of Metropolitan Magistrate in view of Section 36-A (1)(a) of NDPS Act. In the complaint, it has also been alleged that there had been commission of offences punishable under Sections 21, 29 read with Section 8(c) of NDPS Act. These offences are exclusively triable by the Special Court. However, its cognizance by the Special Court cannot be taken on private complaint without the accused being committed to it for trial. Under the general power of taking cognizance of any offence the question, whether the Metropolitan Magistrate has a jurisdiction to entertain a private complaint in respect of these offences and

direct investigation under Section 156(3) or take steps as provided under chapter XV of Cr.P.C. and in case it is found that the aforesaid offences have been committed to commit the case to the Special Court, is left open for the Metropolitan Magistrate to decide if at all the complaint is presented before me.

. As regards offences under Arms Act, they being triable by the Magistrate, the complaint would very well lie before the said court."

5. Pursuant to the order passed on 5/5/2005 the complaint of the respondent no.2 was taken up for verification before the learned Chief Metropolitan Magistrate, Esplanade, Mumbai who subsequently transferred the complaint to the court of the learned Addl. Chief Metropolitan Magistate, 2nd Court, Mazgaon, Mumbai. The respondent no.2 filed an application on 4/9/2006 before the learned Addl. Chief Metropolitan Magistrate, 2nd Court, Mazgaon,

Mumbai and prayed for orders under Section 156(3) of Cr.P.C. and on 16/9/2006 the learned Magistrate directed that the complaint be sent to the Deputy Commissioner of Police, Zone-I for enquiry under Section 156(3) of Cr.P.C. by an appropriate officer. The DCP, Zone-I assigned the investigation to an officer of the Dongri Police Station, but subsequently it was transferred to M.R.A. Marg Police Station by his predecessor Shri Naval Bajaj, DCP on the representation made by the respondent no.2. The M.R.A. Marg Police Station undertook the investigation and on 21/11/2006 registered the FIR for the offences punishable under Sections 191 to 193, 195, 196, 200 and 211 of IPC, Section 58 read with Section 8(c) and 29 of NDPS Act, 1985 and Sections 3 and 25 of the Arms Act against 13 persons as noted hereinabove. The complaint of respondent no.2 on transfer/representation to the Additional Chief Metropolitan Magistrate, Mazgaon, has been registered as Criminal Case No.83/Misc./2006 (27/I&R/2006). The petitioner-police officer, therefore, prays for quashing of the FIR as well as the Criminal Case No.83/Misc./2006 (27/I&R/2006).

6. From the affidavit filed by Shri Ravindra Khanderao Doiphode, P.I., presently attached to M.R.A. Marg Police Station, Mumbai it is revealed that on 22/11/2006 he recorded the statement of PI Ambre who carried out the investigation of NDPS Case vide C.R.No.4 of 2004 of Dongri Police Station against the present respondent no.2. On 23/11/2006 he called four police personnel, namely, Rajendra Savant, HC No.10025, Pradeep Shinde, PC No.29834, Arun Kachare, PC No.27515, Anil Bhausaheb Holkar, PC NO.10363 for enquiry as these were the personnel present at the time when the alleged raid was conducted by the petitioner on 19/10/2004 below the office of applicant no.2 in Criminal Application No.4478 of 2006. On 28/11/2006 he referred the statements of four police personnel and statements of two more police personnel, namely, Dashrath Galande, PN No.24523 and Suresh Mane, PN No.25965, whose names had appeared in the panchanama dated 20/11/2004 in NDPS case vide C.R. No.4 of 2004, were recorded. On 2/12/2006 statements of two more police personnel, namely, Madhusudan Khutwad, HC No.18048 and Santosh Pawar, PC No.29787, whose names appeared in the panchanama dated

20/11/2004 in NPDS Case vide C.R.No.4 of 2004 were also recorded. On 12/12/2006 he recorded the statement of API Pradeep Kadam whose name appeared in the panchanama dated 20/11/2004 in NDPS Case vide C.R. No.4 of 2004. On 13/12/2006 he recorded the statement of PI Chandrakant Naik whose name appeared in the panchanama dated 20/11/2004 in NDPS Case vide C.R.No.4 of 2004. On 29/12/2006 he recorded the statement of Shri Mohd. Sharif Attuddin Shaikh who was one of the panch witnesses in the said NDPS case against the present respondent no.2.

7. The petitioner came to be suspended and departmental enquiry was initiated against him which was conducted by the ACP, Pydhoni Division. The enquiry was completed and report was submitted by Shri Netaji Tambvekar on 31/8/2006. The following charges have been held to be proved against the petitioner and the enquiry officer has recommended major punishment of dismissal from service against the petitioner:-

"(1) It is stated that the action taken against Shri Rajesh Solanki was taken as per the information (tip off) received from

special informer. Though you have been given orders in writing by Deputy Commissioner of Police, Zone-1 to produce before him the person who gave the information, you did not produce the informer and in that regard you have given indeterminate (vague) explanation.

(2) Though Rajesh Solanki was arrested on 19/10/2006 at Jogeshwari, it has been shown that he was arrested at Dongri on 20/10/2004. In this regard, in the incident, you made ready (produced) the panchas of your favour and pressurised them to witness (make statement) that Shri Solanki was arrested in Dongri and thereby you drew the panchanama.

(3) In the case of narcotic substances, though it was necessary to take house-search presuming that the accused might have in possession of more quantity, after the arrested accused Rajesh Solanki was arrested, house-search was not taken, though it was necessary to take such search of his house.

(4) It was not traced as to how the foreign make Pistol and 340 gram of brown sugar powder, which were recovered from the possession of the accused, had procured by him and who had given to him.

(5) You have prepared fabricated (bogus) papers by levelling allegation of Pistol and brown sugar powder against the accused Rajesh Solanki. By preparing bogus witness evidence against the accused Rajesh Solanki, implicated one innocent person in the offence."

8. It is contended by the learned counsel for the petitioner that the learned Magistrate acted without jurisdiction in directing an enquiry under Section 156(3) of Cr.P.C. He further submitted that the complainant i.e. respondent no.2 suppressed the fact from the learned Magistrate that the order of discharge passed in favour of the respondent no.2 has been challenged by the petitioner in Criminal Writ Petition No. 2923 of 2005 and the said petition has been admitted. Consequently, the order of discharge

passed in favour of the respondent no.2 cannot be said to have attained finality as of now. It was necessary for the learned Magistrate to have appreciated that under Section 36-A of the NDPS Act, no private complaint can be lodged before him and in fact it empowers only the Special Court to take cognizance of such offences on the police report. It was further pointed out that the learned Magistrate has dealt with the complaint as if filed under Section 200 and taken cognizance for sending it for investigation under Section 156 (3) of Cr.P.C. in which there are allegations of commission of offence under NDPS Act. This action of the learned Magistrate is, therefore, without jurisdiction.

9. The respondent no.2 has filed affidavit in reply and pointed out that he has filed Misc. Application No.149 of 2005 before the learned Special Judge for an enquiry under Section 340 of Cr.P.C. into the offences referred under Section 195(1)(b)(i) of Cr.P.C. in relation to the judicial proceedings before the said court. He has further pointed out that the complaint submitted by him on 28/2/2005 was returned to him by the learned Special Judge while

retaining the purported action under Section 340 of Cr.P.C. for the offences covered by Section 195(1)(b)(i) of Cr.P.C. and he could not have changed the complaint when he presented it to the court of learned Chief Metropolitan Magistrate. Under these circumstances, the total FIR cannot be quashed and set aside and investigations which have been commenced pursuant to the order passed under Section 156(3) of Cr.P.C. cannot be quashed at this premature stage. He has further submitted that the enquiry under Section 156(3) of Cr.P.C. would cause no prejudice to the present petitioner and while participating in the investigation or upon filing a report before the learned Magistrate under Section 157 of Cr.P.C., the petitioner can reagitate his grievance. He has emphasised that he suffered in custody 150 days of his life for an offence in which he was not involved and the petitioner in collusion and in connivance with others had framed him. He has further submitted that if during the enquiry sufficient evidence or reasonable grounds are made out, the steps as enumerated under Section 170 of Cr.P.C. will have to be taken by the learned Metropolitan Magistrate. Under these circumstances the respondent no.2 has also

opposed this application.

10. It is clear that the order passed by the learned Special Judge (under NDPS Act) on 5/5/2005 has not been challenged by the petitioner. The said order has divided the complaint filed by the respondent no.2 before the learned Special Judge on 28/2/2005 in different parts. The learned Special Judge opined that the cognizance of any offence punishable under Section 195(1)(b)(i) can be taken by following the procedure laid down under Section 340 of Cr.P.C. and the complaint could be made to the court trying the case or by such officer of the court as that court may authorise in writing or some other court to which that court is subordinate. The learned Special Judge noted that the necessary steps be taken in that regard in the remand proceeding and the investigating officer of M.R.A. Marg Police Station was directed to file detail report. So far as the offence punishable under Section 58 of NDPS Act is concerned, it is triable by the Court of Metropolitan Magistrate in view of Section 36-A (1)(a) of the NDPS Act, whereas the offences punishable under Sections 21, 29 read with Section 8(c) of the NDPS Act are exclusively triable

by the Special Court, however, its cognizance cannot be taken by the Special Court on private complaint when the accused being committed to trial. This view of the learned Special Judge has not been challenged by the petitioner. Mere pendency of the writ petition challenging the order of discharge of respondent no.2 cannot be a reason to hold that Criminal Case No. 83/Misc./2006 (27/I&R/2006) filed on the complaint made by the respondent no.2 cannot be entertained. The Magistrate will have to consider the enquiry report under Section 156(3) of Cr.P.C. and then examine whether a prima facie case has been made out against the petitioner. As of now the complaint filed by the respondent no.2 is under investigation.

11. Having regards to the fact that the complaint of the respondent no.2 has been initially dealt with by the learned Special Judge by his order dated 5/5/2005 and the said order having not been challenged by the petitioner, the learned Magistrate has rightly directed an enquiry under Section 156(3) of Cr.P.C. and at this stage there is no prejudice caused to the petitioner. The application is, therefore, premature and it is well settled that the powers under Section

482 of Cr.P.C. are required to be used sparingly and with utmost circumspection by this court. In this regard I may usefully rely upon the decision in the case of M. Narayandas Vs. State of Karnataka and ors. **[2004 ALL Mr (Cri) 217 (S.C.)]**. I am satisfied that the applicant has not made out a case to invoke such powers at least at this stage.

12. Hence, the application is rejected summarily.

(B.H. Marlapalle,J.)

. After the order was pronounced, Mr. Pradhan the learned counsel for the petitioner sought clarifications and it is hereby clarified that if and when the petitioner is required to move an application under Section 438 of Cr.P.C., the same shall have to be decided on its own merits.

25/7/2007 **(B.H. Marlapalle,J.)**